In the Supreme Court of the United States

OCTOBER TERM, 1975

No.

WILLIAM E. SIMON, SECRETARY OF THE TREASURY, ET AL., PETITIONERS

v.

MARGOT E. CARO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the Secretary of the Treasury and other named federal parties, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-12a) is reported at 521 F.2d 1084. The opinion and order of the district court (App. C, *infra*, pp. 15a-23a) are not reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, pp. 13a-14a) was entered on September 3, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a federal employee who, under Section 717(c) of the Civil Rights Act of 1964, as added, 86 Stat. 111, 42 U.S.C. (Supp. III) 2000e-16(c), brings a civil action alleging unlawful employment discrimination, is entitled to a plenary trial *de novo* in the district court rather than a review of the administrative record.

STATEMENT

Respondent is an employee of the Audit Division of the Internal Revenue Service in Chicago. On December 18, 1972, she filed a formal administrative complaint, alleging that the Internal Revenue Service, Chicago Division, discriminated against her on the basis of sex during 1971 and 1972 in not placing her on promotion rosters for Internal Revenue Agent, GS-13. She also alleged that there was systematic discrimination against women in promotions to higher grades within the Internal Revenue Service. A hearing was held at which respondent and two agency witnesses testified. The Complaint Examiner concluded that any institutional sex bias that may have existed did not affect respondent's promotion

ratings, and he accordingly recommended a finding that respondent was not denied a promotion, or promotional opportunity, because of her sex. The Complaint Examiner's recommendations were adopted as the final agency decision. (App. A, *infra*, p. 2a; App. C, *infra*, pp. 15a-17a.)

Within 30 days after respondent received notice of the agency's decision, she filed this action in the United States District Court for the Northern District of Illinois pursuant to Section 717(c) of the Civil Rights Act of 1964, 42 U.S.C. (Supp. III) 2000e-16(c). She sought retroactive promotion to GS-13 with back pay, as well as certification of a class of all female revenue agents employed in the Audit Section of the Internal Revenue Service.

The district court granted the government's motion for summary judgment. The court based its decision upon its review of the administrative record. It held (App. C, *infra*, p. 22a):

> [S]ince the administrative decision finding that sex discrimination did not affect plaintiff's promotional opportunities was supported by the clear weight of evidence and since it appears that plaintiff had full opportunity to present all relevant evidence to the Complaint Examiner, defendants' motion for summary judgment must be granted.[1]

The court of appeals reversed and remanded (App. A, *infra*, pp. 1a-12a). Relying largely on *Sperling* v.

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[1] The court also dismissed the class action, but without prejudice.

United States, 515 F. 2d 465 (C.A. 3), petition for a writ of certiorari pending, No. 75-247, the court held that federal employees in suits under Section 717(c) are entitled to a *de novo* hearing in the district court if material factual disputes are present.

REASONS FOR GRANTING THE WRIT

The *de novo* hearing issue in this case is the same as that presented in *Chandler* v. *Roudebush*, No. 74-1599, certiorari granted, October 6, 1975.[2]

CONCLUSION

We suggest that this petition be held pending the decision in *Chandler* and then acted upon in accordance with that decision.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1975.

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[2] The court of appeals in this case denied the government's motion to extend the time for filing a petition for rehearing until this Court's disposition of *Chandler*. It stayed its mandate, however, pending the timely filing of a petition for a writ of certiorari.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 74-1728

MARGOT E. CARO, on behalf of herself and all other persons similarly situated, PLAINTIFF-APPELLANT

v.

GEORGE SCHULTZ, Secretary of the Department of the Treasury; DONALD C. ALEXANDER, Commissioner, Internal Revenue Service; EDWIN P. TRAINER, Regional Commissioner, Internal Revenue Service; ROGER C. BECK, Chicago District Director, Internal Revenue Service; WILLIAM KRODEL, Chief Audit Division, Chicago District Internal Revenue Service, DEFENDANTS-APPELLEES

Appeal from the United States District Court
for the Northern District of Illinois
Eastern Division—No. 73 C 2313

JAMES B. PARSONS, Judge

Argued April 10, 1975—Decided September 3, 1975

Before FAIRCHILD, *Chief Judge*, CUMMINGS, *Circuit Judge*, and BRYAN, *Senior District Judge*.*

CUMMINGS, *Circuit Judge*. Plaintiff is an employee of the Audit Division of the Internal Revenue Service in Chicago. In December 1972, she filed a complaint with her employer alleging sex discrimination in Chicago District Audit Division employment promotions between October 1971 and October 1972. Since the complaint was not resolved informally, an administrative hearing was held before a Civil Service Commission Equal Opportunities Complaint Examiner on July 5, 1973. After considering documentary and testimonial evidence, the Complaint Examiner initially determined that plaintiff had not been denied promotional opportunity because of her sex, and the Internal Revenue Service concurred in his recommended decision.

In September 1973, plaintiff filed suit under Section 706 of the Equal Employment Opportunity Act of 1972 (42 U.S.C. § 2000e-5) alleging individual and class claims of sex discrimination in employment in violation of Section 717 of that Act (42 U.S.C. § 2000e-16).

In the district court, defendants filed the certified administrative record of the proceedings within the Internal Revenue Service and before the Complaint Examiner, together with an answer, motion to dis-

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* Senior District Judge Frederick vanPelt Bryan of the United States District Court, Southern District of New York, is sitting by designation.

miss and motion for summary judgment. While the district court was considering those matters, it barred the discovery sought by plaintiff.

In June 1974, the district court filed a memorandum opinion and order granting the Government's motion for summary judgment and dismissing plaintiff's complaint with prejudice and that of the class without prejudice. This appeal does not involve the dismissal of the class action.[1]

In the opinion below, the district judge held that in light of the administrative hearing, "no trial *de novo* is required." Instead, he adopted the following standard for review set forth in *Hackley* v. *Johnson*, 360 F.Supp. 1247, 1252 (D.D.C. 1973), appeal docketed, No. 73-2072 (D.C. Cir. September 7, 1973):

> "The District Court is required by the Act to examine the administrative record with utmost care. If it determines that an absence of discrimination is affirmatively established by the clear weight of the evidence in the record, no new trial is required. If this exacting standard is not met, the Court shall, in its discretion, as appropriate, remand, take testimony to supple-

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[1] Because appellant does not raise an issue with respect to the dismissal of the class aspect of her suit, we presume that she has not appealed from the dismissal of the class action. No mention is made of it in her argument. Since this Court reverses and remands as to her personal claim and the dismissal of the class claim was without prejudice, she may seek to reallege the class claims on remand. In this posture there is no need for us to explore her right to add class action allegations to her suit after exhausting administrative remedies only as to her personal claim.

ment the administrative record, or grant the plaintiff relief on the administrative record."

While recognizing that some other district courts had ruled in favor of "trials *de novo*" in this type of case,[2] the district judge applied the *Hackley* approach and held that "the clear weight of all the evidence [the administrative record] before me establishes that sufficiently proper grounds existed for the denial of promotions to the plaintiff in August 1971, February 1972 and August 1972." Concluding that the proper scope of review was not employed, we reverse.

While not passing on the merits of the plaintiff's case, it is appropriate to advert to certain matters in the record that denigrate from the summary judgment granted to defendants here, since this opinion acknowledges the propriety of summary judgment in some such cases as plaintiff's. Plaintiff joined the Chicago office of the Internal Revenue Service at a salary level of GS-9 in July 1966. She reached the salary level of GS-12 in February 1970 and stayed at that level throughout the course of this litigation.

From October 1971 through October 1972, in accordance with customary procedures, her agency established three promotion rosters but did not include

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[2] *Jackson* v. *U.S. Civil Service Commission*, S.D. Tex. 1973, 7 EPD ¶ 9134; *Thompson* v. *U.S. Department of Justice*, 360 F. Supp. 255 (N.D. Calif. 1973); *Griffin* v. *U.S. Postal Service*, M.D. Fla. 1973, 7 EPD ¶ 9133, were cited in the opinion. An exhaustive catalog of the decisions which have answered the "trial *de novo*" issue, up to the date of the opinion, can be found in *Sperling* v. *United States*, 515 F.2d 465, 474 (3d Cir. 1975), at n.39.

plaintiff in any of them, although she had been recommended for inclusion by her immediate supervisors on each occasion. The October 1971 preliminary promotion roster contained 137 eligible GS-12 revenue agents, of which seven were women. The members of the *ad hoc* committee dealing with promotions chose 37 agents for the final roster, including one woman. However, only two agents were promoted to GS-13 from that roster and both were males. The ratio of men to women at the GS-12 level was 9:1.

Out of 35 persons placed on the April 1972 promotion roster, only one was a woman although 12 were eligible. Seventeen male agents were promoted to GS-13, and no woman was promoted to that category.

In October 1972, eleven women were eligible for inclusion in the GS-13 promotion roster. One woman and 29 men were selected for the roster. Fifteen male agents were promoted therefrom to GS-13 but no woman was promoted.

During the period from September 1970 to October 1972, 75 male agents were promoted but only one woman was promoted to GS-13.

In summary, during the two and one-half years in question, one female GS-13 was replaced by another, so that there was only one GS-13 female revenue agent out of 214 throughout the period. During the five promotion periods in question, only one woman was promoted out of 75 persons promoted. These statistics buttress plaintiff's claim that she had es-

tablished a *prima facie* case even thugh she was denied discovery.

In addition to the statistical evidence adduced in the administrative proceedings, there are other points making the propriety of summary judgment doubtful. In the administrative proceedings, the only substantial reason given for plaintiff's not being placed on the promotion rosters in question was her "poor attitude," but the Complaint Examiner found that "such opinions [with respect to her attitude] are not mirrored by matters contained in the agency's official or unofficial files." One of plaintiff's supervisors made comments to the Equal Employment investigator to the effect that plaintiff is a "frustrated housewife" who is "too emotional." Another's comments seemed to suggest his opinion that plaintiff's "bitchiness" could be due to menopause. Finally, the examiner acknowledged with respect to the statistical evidence that:

> "Based exclusively on a review of the employment and promotional statistics pertaining to Revenue Agent positions, a strong and reasonable, although circumstantial argument can be made that the agency's assignment and utilization of female agents is both institutionally and systematically discriminatory on the basis of sex.
>
> "Notwithstanding, the appearance of discrimination against females as a class does not, standing alone, serve as evidence supportive of complainant's individual complaint."

Such a total rejection of the evidentiary value of the statistics is questionable, especially where plaintiff's

employment record failed to contain proof of her supposed poor attitude problem.

The principal question presented by this appeal is what is the nature of the proceedings in a district court under 42 U.S.C. § 2000e-5 when suit is filed by a federal employee who has already utilized the administrative machinery within his department and the Civil Service Commission ("CSC") as to a claim of discrimination. Three possibilities are suggested: (1) the district court should perform only an administrative review; (2) the proceedings in the district court should be a full trial with the court making its own determinations of the facts and law; or (3) the district court may choose between these two, or perhaps remand the case, as suggested by *Hackley* v. *Johnson, supra.*

At least since the 1974 decision in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, it is clear that private employees are entitled to a full and independent district court determination of their discrimination claims pursuant to Section 706 (42 U.S.C. § 2000e-5) even after prior submission of their claims to arbitration. A private employee is also entitled to a full trial in federal court although the Equal Employment Opportunity Commission has found that there is no reasonable or probable cause to believe that the claimant is a victim of discrimination. *McDonell Douglas Corp.* v. *Green*, 411 U.S. 792; *Flowers* v. *Local No. 6, Laborers International Union*, 431 F.2d 205 (7th Cir. 1970). The Government urges

that despite these decisions, an employee of the federal Government is not entitled to a full evidentiary hearing of Title VII claims if, prior to filing in the district court, the employee has exhausted his administrative remedies.

In *Sperling* v. *United States*, 515 F.2d 465 (3d Cir 1975), this problem was examined in an exhaustive opinion by Judge Gibbons. There it was decided that a federal employee such as the present plaintiff is entitled to "*de novo*" proceedings in the district court.[3] We are in accord with that decision.

The controlling statutory provision is Section 717 (d), which provides:

> "The provisions of section 706(f) through (k), as applicable, shall govern civil actions brought hereunder."

As seen, in *Alexander* v. *Gardner-Denver Co.*, *supra*, the Supreme Court has already determined that Section 706 does provide for *de novo* review. As carefully explained in the *Sperling* opinion, the modifying words "as applicable" in Section 717(d) do not limit *de novo* review. 515 F.2d at 476-481.

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[3] There is room for debate whether the characterization "trial *de novo*" is technically appropriate where the prior proceedings were administrative, rather than judicial, and the record of the administrative proceedings is admissible as evidence in the district court. Compare *Bowers* v. *Campbell*, 505 F.2d 1155 (9th Cir. 1974), with *Sperling* v. *United States*, *supra*; see generally, Black's Law Dictionary, at 1677 (4th ed. 1957). The cases that use the term are clear in the meaning that they assign to it, so that no confusion should be caused.

Not only does the language of Section 717(d) provide for *de novo* review here, but the Senate report is consonant therewith. Thus it provides:

> "Aggrieved employees or applicants will also have the full rights available in the courts as are granted to individuals in the private sector under title VII." S. Rep. 92-415, 92nd Cong., 1st Sess. 17 (1971).

Similarly, Senator Williams, one of the Act's original sponsors and its manager on the floor, stated as follows with respect to Section 717(c), which permits aggrieved federal employees to file a civil action:

> "There is no reason why a Federal employee should not have the same private right of action enjoyed by individuals in the private sector, and I believe that the [Senate] committee has acted wisely in this regard." 118 Cong. Rec. 4922 (1972).

Senator Cranston, who was instrumental in securing enactment of Section 717, stated as follows:

> "As with other cases brought under title VII of the Civil Rights Act of 1964, Federal district court review would not be based on the agency and/or CSC record and would be a trial de novo." 118 Cong. Rec. 4929 (1972).

The inconsistencies in the legislative history are persuasively resolved in favor of the "*de novo*" interpretation in *Sperling*, thus causing us to agree with the Third Circuit's conclusion that Congress intended "to provide an aggrieved federal employee with as

full a panoply of procedural remedies in the district court as those afforded a private sector litigant." 515 F.2d at 481. This is in accord with the special regard that Congress has shown for those who suffer discrimination in employment.

For a contrary view, the Government relies on *Salone* v. *United States*, 511 F.2d 902 (10th Cir. 1975), petition for certiorari docketed June 19, 1975, 44 L.W. 3066, and *Chandler* v. *Johnson*, 515 F.2d 251 (9th Cir. 1975), petition for certiorari docketed June 19, 1975, 44 L.W. 3066. In *Salone*, the court cited *Hackley* v. *Johnson*, *supra*, and followed its approach in holding "that a de novo hearing is not here required," acknowledging that if the trial court should find need for additional facts on a particular issue, the matter could be remanded to the Civil Service Commission.[4] In *Chandler*, the court of appeals was careful to hold that the district court had not committed error in deciding it on the administrative record in the circumstances of that case. The *Chandler* court limited its decision to cases "where the administrative record affirmatively shows * * * that the challenged personnel action was based upon nondiscriminatory reasons;" where there was a fair hearing and where there is no showing of a need to add to the administrative record.[5] The court did not ex-

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[4] The Tenth Circuit rested its holding in part on the Administrative Procedure Act (5 U.S.C. § 701), but the Equal Employment Opportunity Act provides that Section 706 of that Act is to govern civil actions of this nature.

[5] In *Ellis* v. *Naval Air Rework Facility*, 10 E.P.D. ¶ 10,257 (N.D. Calif. 1975), the district court refused to follow

pressly follow *Hackley*. To the extent that *Salone* and *Chandler* are inconsistent with *Sperling*, we approve the reasoning of the Third Circuit.[6]

In the present case, the plaintiff is entitled to pursue discovery and to supply appropriate materials in opposition to the Government's motion for summary judgment. If the existence of any genuine issue of fact as to any employment discrimination then remains, the case must proceed to trial. As held in *Sperling*,

> "If [summary judgment] is not granted, the agency record is admissible in evidence at trial when appropriate under the applicable Federal Rules of Civil Procedure and of Evidence. And, as in any other civil action, the aggrieved federal employee must prove his or her discrimination claim by a preponderance of the evidence." 515 F.2d at 484.

Without passing on the merits of her claim, it appears from the record that plaintiff may be able to oppose summary judgment successfully. In that event, she will be entitled to a full trial before the district court and an independent decision on her claims.

Chandler, apparently reasoning that the Ninth Circuit would have reached a different result if it had considered the persuasive arguments set forth in *Sperling*.

[6] Because we are choosing one of the views on which there is a conflict between circuits, this opinion was circulated, before filing, to all judges of this Court in regular active service. There has been no request for a vote on a hearing *en banc* on this issue.

Reversed and remanded for further proceedings consistent herewith.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

OPINION BY JUDGE CUMMINGS
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

September 3, 1975

Before: Hon. THOMAS E. FAIRCHILD, Chief Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. FREDERICK VANPELT BRYAN, Senior District Judge*

No. 74-1728

MARGOT E. CARO, ETC., PLAINTIFF-APPELLANT

vs.

GEORGE SCHULTZ, ETC., ET AL.,
DEFENDANTS-APPELLEES

Appeal from the United States District Court
for the Northern District of Illinois
Eastern Division—No. 73 C 2313
JAMES B. PARSONS, Judge

This cause came on to be heard on the transcript of the record from the United States District Court

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* Senior District Judge Frederick vanPelt Bryan of the United States District Court, Southern District of New York, is sitting by designation.

for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED AND REMANDED, with costs, in accordance with the opinion of this Court filed this date.

BLEED THROUGH

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No 73 C 2313

MARGOT E. CARO, on behalf of herself and all other persons similarly situated, PLAINTIFF

v.

GEORGE SCHULTZ, Secretary of the Department of the Treasury, ET AL., DEFENDANTS

MEMORANDUM OPINION AND ORDER

This is an action for equitable, declaratory and monetary relief to obtain redress for alleged sex discrimination in employment in violation of Title VII of Civil Rights Act of 1964 as amended. 42 U.S.C. § 2000e-16(a); 86 Stat. 111, P.L. 92-261. This Court has jurisdiction pursuant to the 1972 Equal Opportunity Act, amending the 1964 Civil Rights Act. 42 U.S.C. § 2000e-16(c); 28 U.S.C. 1331(a).

The plaintiff, Margot E. Caro, is an employee of the Audit Division of the Internal Revenue Service of the U. S. Treasury Department. She brings this action on behalf of herself and all other persons similarly situated. The defendants are all employees of the U. S. Treasury Department. Plaintiff alleges that in August, 1971, in February, 1972, and again in August, 1972, it was recommended by her group

supervisor that she be placed on the promotion roster for Internal Revenue Agent, Grade GS-13. At none of these times was she so placed, nor has she been so placed until the present. Plaintiff alleges that there existed at least since August, 1971 in the Audit Division of the Internal Revenue Service a continuing and systematic discrimination against women in promotion into the higher grades of Internal Revenue Agents even though such women were performing the equivalent work and had the equivalent qualifications as their male counterparts. Plaintiff alleges that this systematic discrimination caused and now causes her to be denied Grade GS-13, and also caused and continues to cause members of plaintiff's class denial of equal opportunity for promotion.

Prior to filing suit in this Court on September 7, 1973, plaintiff filed a formal administrative complaint on December 18, 1972 charging the Internal Revenue Service, Chicago District, with having discriminated against her because of her sex. The complaint could not be informally resolved, and thus a hearing was held in Chicago on July 5, 1973. Testimony of the plaintiff and of two witnesses called by the Internal Revenue Service was heard by a Complaint Examiner, and at least one exhibit was considered by him. Included in the Equal Employment Opportunity Complaint Examiner's Findings of Fact and Conclusions was the following:

> ". . . Based exclusively on a review of the employment and promotional statistics pertaining to Revenue Agent positions, a strong and rea-

> sonable, although circumstantial argument can be made that the agency's assignment and utilization of female agents is both institutionally and systematically discriminatory on the basis of sex.
>
> Notwithstanding, the appearance of discrimination against females as a class does not, standing alone, serve as evidence supportive of complainant's individual complaint. In this case, the uncontroverted record shows that complainant . . . had acquired GS-13 level experience in her work, was determined as ready for promotion to that level, and was evaluated with respect to her potential for service at that grade. Complainant did not then and does not now seriously contest the assigned ratings, and in no way does she suggest that the ratings were affected by consideration of her sex. As a result, there exists no reasonable basis to conclude that the ratings were contrived or otherwise inappropriate."

The Complaint Examiner thereby recommended that complainant was not entitled to specific relief, for he found complainant's allegation that she was denied a promotion, or promotional opportunity, because of her sex is not supported by the evidence. The Complaint Examiner's recommendations were adopted by the Director of the Equal Opportunity Program on August 9, 1973.

Subsequent to plaintiff's filing suit in this Court, defendants moved to have the complaint dismissed and then moved for summary judgment.

I.

Defendants argue that this Court lacks jurisdiction under 42 U.S.C. 2000e-16(c) over all allegations of discrimination in promotional procedures and actions prior to March, 1972, because the statute did not take effect until then. They thus move this Court to dismiss the complaint. Rule 12(b)(1) of Federal Rules of Civil Procedures. They cite *Palmer* v. *Rogers* 6 EDP ¶ 8822 (D.D.C., September 7, 1973) and *Place* v. *Weinberger* 6 EDP ¶ 9010 (E.D. Mich., July 5, 1973). Defendants' reliance on *Palmer* is misplaced. In *Palmer*, the initial complaint with the agency was filed in October, 1968, almost a year before Executive Order 11478 was promulgated. Here, the complaint was first filed in December, 1972—after 42 U.S.C. 2000e-16(c) took effect. Furthermore, the complaint alleged discriminatory practices against her dating back to August, 1971; by August, 1971 the Internal Revenue Service was under a duty pursuant to Executive Order 11478 to refrain from discriminatory practices based on sex, as well as under a constitutional duty. The reliance in *Palmer* on *Cohen* v. *Chesterfield County School Board* 474 F2d 395 (4th Circ., 1973) also seems misplaced. *Cohen* involved discriminatory practices by state officials prior to the Equal Employment Opportunity Act of 1972 when such state officials were not under the duty created by Executive Order 11478. *Cohen*, 474 F2d n.1 at 395-396. Furthermore, with respect to the retroactivity issue, *Palmer* simply held that the

1972 Act, including 42 U.S.C. 2000e-16(c), did not apply to final agency actions taken after the effective date of the Act in March, 1972, but which were begun before March, 1972. Here, the initial complaint was filed after March, 1972.

I find that this Court has the power and the duty to examine allegations of sex discrimination which are brought after March, 1972 under 42 U.S.C. 2000e-16(c) and which allegedly occurred after the issuance of Executive Order 11478 in 1969. This is in accord with numerous decisions which allow judicial examinations under 42 U.S.C. 2000e-16(c) of discriminatory acts allegedly occurring after 1969 and brought to the attention of agency officials either prior to or after March 24, 1972. See *Hackley* v. *Johnson* 360 F. Supp. 1247 (D.D.C. 1973); *Johnson* v. *University of Pittsburgh* 359 F.Supp. 1002 (W.D. Pa. 1973); *Walker* v. *Kleindienst* 357 F.Supp. 749 (D.D.C. 1973); *Handy* v. *Gayler* 364 F.Supp. 676 (D.Maryland, 1973). For these reasons, I deny defendants' motion to dismiss under Rule 12(b)(1).

II.

Defendants further argue that dismissal is warranted under Rule 12(b)(6) of the Federal Rules of Civil Procedure. I again deny the motion to dismiss, for many of the reasons stated above. 42 U.S.C. 2000e-16(c).

III.

Defendants finally move that this Court grant summary judgment in their favor. The ruling on

this motion depends on the scope of review afforded a trial court under 42 U.S.C. 2000e-16(c). Plaintiff has argued that she is automatically entitled under the 1972 Act to a trial de novo on the facts concerning defendants' allegedly discriminatory actions. Defendants have urged this Court to adopt a much more limited scope of review. They state in their memorandum of law that "the review permitted and authorized by the 1972 Act is the same as has been enunciated in decisions reviewing those personnel actions which were previously reviewable." I reject both plaintiff's and defendants' positions as being too rigid. I find that the proper scope of judicial review under 42 U.S.C. 2000e-16(c) may vary from case to case. The Court in *Hackley* v. *Johnson, supra,* established a fine guide as to the proper scope of review when it said:

> "The trial de novo is not required in all cases. The District Court is required by the Act to examine the administrative record with utmost care. If it determines that an absence of discrimination is affirmatively established by the clear weight of evidence in the record, no new trial is required. If this exacting standard is not met, the Court shall, in its discretion, as appropriate, remand, take testimony to supplement the administrative record, or grant the plaintiff relief on the administrative record." 360 F. Supp. at 1252.

See also *Johnson* v. *U. S. Postal Service* 364 F.Supp. 37 (N.D.Fla. 1973), and *Handy* v. *Gayler, supra,* adopting this approach.

I recognize that the approach taken here is contrary to the rulings of several other district courts. *Jackson* v. *U. S. Civil Service Commission* S.D.Tex. 1973, 7 EPD ¶ 9134; *Thompson* v. *U. S. Department of Justice* 360 F.Supp. 255 (N.D.Calif. 1973); *Griffin* v. *U. S. Postal Service* M.D.Fla. 1973, 7 EPD ¶ 9133. However, I am not afraid that the approach I have taken will make it "simply too easy" for me to lapse into a review of the record. *Jackson, supra,* 7 EPD ¶ 9134, p. 6756. I do feel the approach will help to effectively carry out the intentions of Congress.

Applying the *Hackley* approach to the case before me, I find that no trial de novo is required and I hold that the clear weight of all the evidence before me establishes that sufficiently proper grounds existed for the denial of promotions to the plaintiff in August 1971, February 1972 and August 1972. No evidence appears that the plaintiff was adversely affected by the supervisory rating system because of her sex; the rating system was the mechanism utilized in IRS decision-making as to promotions. The evidence before me also clearly shows that plaintiff's ratings did not exceed or did not equal those of employees who were promoted to the GS-13 grade. Plaintiff's correspondence contained in the administrative record evidences the type of attitude toward authority which others have claimed was a partial reason for plaintiff's non-promotion. Finally, the Administrative Record shows that all government per-

sonnel who investigated plaintiff's charges were quite sensitive to the problems of systematic institutional bias against women; yet, as indicated earlier, not one of them found that whatever institutional bias might have existed actually affected plaintiff's opportunities for promotion. Accordingly, since the administrative decision finding that sex discrimination did not affect plaintiff's promotional opportunities was supported by the clear weight of evidence and since it appears that plaintiff had full opportunity to present all relevant evidence to the Complaint Examiner, defendants' motion for summary judgment must be granted.

I might add that in dismissing the cause of action by plaintiff Margot Caro, I have also dismissed the class action. Although the dismissal of plaintiff Caro's individual action is with prejudice, the dismissal of the class action is without prejudce. A complaint filed as a class action seeks relief for all persons aggrieved by unlawful employment practices. The investigation conducted by the EEO Complaint Examiner was limited in purpose to the specific acts of discrimination against plaintiff—though mention was made of possible institutional discrimination within the IRS. There has been no "final action taken" by the IRS with respect to charges of discrimination against a class. Once final IRS action has been taken on the matter of alleged class discrimination, this Court would then have jurisdiction. 42 U.S.C. 2000e-16(c). The Court finally notes that the IRS is under both a statutory and constitu-

BLEED THROUGH

tional duty not to discriminate against women as a class. 42 U.S.C. 2000e-16(a); U.S. Constitution, Amendment V.

The above is so adjudged, ordered and decreed.

ENTER:

/s/ James B. Parsons
JAMES B. PARSONS
United States District Judge

DATE: June 27, 1974

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 597997 134

SUPREME COURT, U. S.

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No. 75-784

In the
Supreme Court of the United States
OCTOBER TERM, 1975

WILLIAM E. SIMON,
SECRETARY OF THE TREASURY,
et al., *Petitioners*

vs.

MARGOT E. CARO,
Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

No. 75-784

WILLIAM E. SIMON,
SECRETARY OF THE TREASURY,
et al., *Petitioners*

vs.

MARGOT E. CARO,
Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

QUESTIONS PRESENTED

I. Are defendants in a Title VII employment discrimination action in the district court entitled to summary judgment on their Rule 56, Federal Rules of Civil Procedure motion, where:

A. the district court repeatedly refused to allow plaintiff the opportunity to take depositions for the purpose of making her defense to the defendants' Rule 56 Motion; and

B. the Certified Administrative Record submitted in support of the motion contained overwhelming statistical evidence of discrimination on the basis of sex in the promotion of female Internal Revenue Agents; and

C. the plaintiff in the case is a female Internal Revenue Agent; and

D. the Certified Administrative Record contained no substantial evidence of non-discriminatory reasons for the failure to promote the plaintiff; and

E. at the very least, there were genuine issues of material fact?

II. Is a federal employee entitled to a trial *de novo* in a district court civil action filed pursuant to §706(f) of the Equal Employment Opportunity Act of 1972, 42 U.S.C. §2000e-5(f) after exhausting her administrative remedies in accordance with the provisions of §717 of the Act, 42 U.S.C. §2000e-16?

STATEMENT OF THE CASE

Respondent would add the following facts to petitioner's Statement:

> In the district court, Defendants filed the certified administrative record of the proceedings within the Internal Revenue Service and before the Complaint Examiner, together with an answer, motion to dismiss and motion for summary judgment. While the district court was considering those matters, it barred the discovery sought by Plaintiff. (Appendix A, pp. 2a-3a, Government's Petition for a Writ of Certiorari)

At the administrative hearing of respondent's charges of sex discrimination in employment within the Internal

Revenue Service—Chicago District Office, the testimonial evidence was supplemented with voluminous documentary evidence, all of which was included in the administrative record considered by the District Court in arriving at its decision to grant the government's motion for summary judgment.

The documentary evidence in the administrative record submitted by the government in support of its motion for summary judgment contained the following facts:

> . . . Plaintiff joined the Chicago office of the Internal Revenue Service at a salary level of GS-9 in July, 1966. She reached the salary level of GS-12 in February, 1970, and stayed at that level throughout the course of this litigation.
>
> From October, 1971, through October, 1972, in accordance with customary procedures, her agency established three promotion rosters but did not include Plaintiff in any of them, although she had been recommended for inclusion by her immediate supervisors on each occasion. The October, 1971, preliminary promotion roster contained 137 eligible GS-12 revenue agents, of which seven were women. The members of the *ad hoc* committee dealing with promotions chose 37 agents for the final roster, including one woman. However, only two agents were promoted to GS-13 from that roster and both were males. The ratio of men to women at the GS-12 level was 9:1.
>
> Out of 35 persons placed on the April, 1972, promotion roster, only one was a woman although 12 were eligible. Seventeen male agents were promoted to GS-13, and no woman was promoted to that category. In October, 1972, eleven women were eligible for inclusion in the GS-13 promotion roster. One woman and 29 men were selected for the roster. Fifteen male agents were promoted therefrom to GS-13 but no woman was promoted.

During the period from September, 1970, to October, 1972, 75 male agents were promoted but only one woman was promoted to GS-13.

In summary, during the two and one-half years in question, one female GS-13 was replaced by another, so that there was only one GS-13 female revenue agent out of 214 throughout the period. During the five promotion periods in question, only one woman was promoted out of 75 persons promoted. (Appendix A, pp. 4a-5a, Government's Petition for a Writ of Certiorari)

ARGUMENT

I.

The government's petition for certiorari in this case is based solely on the fact that the *de novo* issue in this case is the same as that presented in *Chandler* v. *Roudebush*, No. 74-1599, certiorari granted, October 6, 1975. As in the Court of Appeals below, the government refuses to recognize the facts in this case—the facts that were presented during the administrative hearing and again in support of the government's own motion for summary judgment in the district court. Those facts, which were recited by the Court of Appeals in its decision below (Appendix A, pp. 4a-7a, Government's Petition for Certiorari) make the granting of the government's petition in this case inappropriate no matter what this court decides in the *Chandler* case.

If in *Chandler* this Court decides that a federal employee is entitled to no more than a review of the administrative record in the district court, the decision of the Court of Appeals for the Seventh Circuit in this case was proper. If this Court decides that a federal employee is entitled to a full trial *de novo* in the district court, the decision of the Court of Appeals for the Seventh Circuit in this case was proper. And, if this Court decides that a federal employee is entitled to some hybrid of the above two types of proceedings in the district court, the decision of the Court of Appeals for the Seventh Circuit in this case was proper.

This is so because the administrative record in this case which was the sole factual record before the district court

when it granted the government's motion for summary judgment contains enough evidence of sex discrimination in employment by the defendants-petitioners to compel a reversal of the district court decision. The Seventh Circuit's decision to reverse and remand was proper whether or not respondent was entitled to a trial *de novo* in the district court.

It cannot be over-emphasized that even if this court decides that a federal employee filing a Title VII case in the district court is entitled to no more than an action in the nature of judicial review, the Seventh Circuit Court of Appeals decision in this case was correct. The district court decision in this case was wrong and must be reversed and remanded as ordered by the Court of Appeals.

II.

The failure of both the district court and the Complaint Examiner before him to recognize the factual and legal importance of the statistical evidence in this case has led to substantial injustice and suffering by the respondent herein. Courts have consistently found statistics to be admissible, competent and compelling evidence of discrimination in Title VII employment discrimination cases. *Schulz* v. *Hickok Mfg. Co., Inc.*, 358 F.Supp. 1208 (D.C. Ga., 1973); *Rowe* v. *General Motors Corp.*, 457 F.2d 348 (C.A. 5, 1972); *Burns* v. *Thiokol Chemical Corp.*, 483 F.2d 300 (C.A. 5, 1973); *Johnson* v. *University of Pittsburgh*, 359 F.Supp. 1002 (D.C. Pa., 1973).

In fact, the case law is clear that statistical evidence of gross discrimination against a protected class of people establishes a *prima facie* case of discrimination. *Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421 (1970); *Wetzel* v. *Liberty Mutual Ins. Co.*, 372 F.Supp. 1146 (D.C.

Pa., 1974). Once a *prima facie* case of discrimination is established, the burden of proof then shifts to the employer to articulate legitimate, non-discriminatory reasons for the challenged action, which in this case was the failure to promote respondent. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973); *Hodgson* v. *First Federal Savings & Loan Association of Broward County, Florida*, 455 F.2d 818 (C.A. 5, 1972).

Applying the above stated rules of law to the instant case, which we must do, we find enormously compelling statistical evidence of discrimination against female revenue agents above the GS-12 level. (See Appendix A, pp. 4a-5a, Government's Petition for a Writ of Certiorari)

The statistics themselves cause the government to have to come forward to positively show that the entire evaluation, recommendation and promotion system employed by the IRS, which admittedly has resulted in *de facto* sex-discrimination, has some substantial relation to a legitimate governmental interest, such as the promotion of qualified agents. *Vulcan Society of New York City Fire Department, Inc.* v. *Civil Service Comm., City of New York*, 6 EPD ¶8904 (D.C.N.Y., 1973); *Chance* v. *Board of Examiners*, 458 F.2d 1167 (C.A. 2, 1972). The district court did not compel the government to do this. And, without more, plaintiff-respondent should have prevailed in the district court.

Neither the substantive law on employment discrimination, nor the case law rules governing the shifting burden of going forth with evidence as outlined in *McDonnell Douglas Corp.* v. *Green, supra*, can be suspended or abrogated merely because the Plaintiff is a federal employee. And if that be so, there is no doubt that the district court erred in granting summary judgment for the government

in this case. On the record had in this case, it is clear that the decision of the Court of Appeals for the Seventh Circuit was absolutely correct, whether or not a federal employee is entitled to a trial *de novo*.

III.

> Rule 56 authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, that no genuine issue remains for trial, and that the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try. *Washington* v. *Cameron*, 411 F.2d 705 (1969), quoting from the Supreme Court opinion in *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U.S. 620, 627, 64 S.Ct. 724, 728, 88 L. Ed. 967 (1944).

Although Appellant herein has no claim to a trial by jury, she does claim a right to a trial by a judge on her complaint for equitable and injunctive relief. Even more than a complaint for damages, a complaint for injunction requires a full evidentiary hearing before the judge from whom the injunction is sought. *Boles* v. *Union Camp Corp.*, 57 F.R.D. 46, 16 F.R. Serv. 2d 1561 (1972).

If there is any doubt on the question of whether there is a genuine issue as to any material fact, such doubt must be resolved in favor of the party opposing the motion. *Rodway* v. *U.S. Department of Agriculture*, 482 F.2d 722 (1973); *Ozark Milling Co., Inc.* v. *Allied Mills, Inc.*, 480 F.2d 1014 (1973). And, as the courts have said, if there are inferences drawn from admitted underlying facts, those inferences must be drawn in the light most favorable to the party against whom the motion for summary judgment is directed. *International Association of Machinists and Aerospace Workers, Dist. No. 8, AFL-CIO* v.

J. L. Clark Co., 471 F.2d 694 (1972). The Seventh Circuit properly assessed the facts before the district court in this case as compelling a reversal of the summary judgment in favor of the government under the standards of Rule 56 FRCP (Appendix A, pp. 4a-7a, Government's Petition for a Writ of Certiorari).

Since question I presented—whether the government was entitled to a Rule 56 FRCP summary judgment in this case—must be answered in the negative, this court need not reach question II—whether a federal employee is entitled to a trial *de novo* on her Title VII complaint in the district court. In fact, since question II, involving a very important issue, is already before this court in *Chandler* v. *Roudebush, et al.*, No. 74-1599, October Term, 1975, there is no legal or public policy reason for the court to grant the government's petition for a writ of certiorari in this case.

CONCLUSION

Respondent prays this court deny the government's petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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February, 1976